NO. 49135-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAURICE CRAIN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Maurice Crain and two other employees, one African-American and the other Caucasian, were terminated from Western State Hospital because of their involvement in the choking death of a patient. Unlike his colleagues, Crain was working under the cloud of a contractual pact known as a "Last Chance Agreement." He had previously misrepresented his health to dishonestly obtain workers' compensation. To get his job back, he signed an agreement that he would resign or be terminated if he was found to have committed any other misconduct while the agreement was in effect. Crain's union, the Washington State Federation of State Employees, elected not to pursue his grievance as extensively as it advocated for his coworkers.

Because Crain was unable to produce any evidence that his protected class was the reason for his discharge, the trial court properly dismissed his claims of disparate treatment and wrongful discharge. Crain's neglect of a patient in critical need of help provided a legitimate basis for his termination.

II. COUNTER-STATEMENT OF THE ISSUES

A. Did the trial court properly grant summary judgment when Crain failed to establish a prima facie case of disparate treatment because there are no proper comparators?

B. Assuming Crain could establish a prima facie case of disparate treatment, did the trial court properly grant summary judgment when DSHS articulated legitimate, non-discriminatory reasons for the employment action and Crain has neither shown those reasons

to be pretextual, nor presented evidence that race was a substantial factor in the decision?

C. Did the trial court properly grant summary judgment when Crain failed to present any evidence that would support his wrongful discharge claim?

III. COUNTER-STATEMENT OF THE FACTS

A. Crain's Role with the Hospital

By September of 2012, Crain had worked at Western State Hospital for over 20 years. For the last five years, he had been a Psychiatric Security Attendant in a secure ward that provided competency restoration for individuals accused of crimes. CP at 49.

As a Psychiatric Security Attendant, Crain was responsible for monitoring patient safety and helping "patients achieve safe, self-sufficient, healthy, and secure lives." CP at 77. Crain worked the swing shift, from 2:45 p.m. to 11:00 p.m. On a typical shift there were seven or eight staff members on the ward, including a Registered Nurse 3, a Registered Nurse 2, a Psychiatric Security Nurse, and multiple Psychiatric Security Attendants. CP at 46-47.

B. The Death of RK

In September of 2012, RK had been assigned to the ward for several weeks.[1] Crain and other staff members had frequently observed RK lying down on the floor of the ward. CP at 45. Crain viewed this as

[1] The patient will be referred to by his initials throughout this brief.

part of RK's "comfort zone" and his "baseline behavior." CP at 45. Crain recalled that RK would drop down to the ground and lie on the floor routinely, and that he had no particular place he favored to lie down. CP at 52.

RK lay either prone or in a manner suggestive to Crain of a Muslim prayer position, face down with his knees tucked under his body and his arms stretched above his head. CP at 51. Crain recalls that, unlike a Muslim in prayer, RK turned his head sideways and not to the ground. CP at 51. Crain does not believe that RK was actually a Muslim in prayer, but rather that he was resting. CP at 53.

On the evening of September 6, 2012, Crain was tasked with overseeing the ward. This meant he was generally assigned to walk through the ward and observe patients. CP at 44. Shortly after RK received his dinner, he lay down on the floor of the ward's common area, in the area Crain was responsible for keeping safe and secure.

Over the next several minutes, Crain and other ward staff walked past RK. RK was intermittently observed for over seven minutes before Diane Parsons, the Psychiatric Security Nurse on duty, noted that RK was not breathing. CP at 80. Parsons called for Crain to help her. CP at 54, 56. They picked him up and turned RK onto his back. CP at 54, 55. Crain recalls RK making a gurgling sound when he was lifted. CP at 55. With

Crain's assistance, Parsons performed stomach thrusts to dislodge the obstruction in his airway. CP at 54, 55, 57. Crain recalls bits of food coming out of RK's mouth while this was occurring. CP at 58. A "code blue" was called, compelling other staff to assist with the emergency. CP at 57. After several minutes of treatment and the arrival of emergency medical technicians, RK was transported to St. Claire's Hospital. While Crain believed RK was breathing when he left Western State Hospital for St. Claire's, the choking incident led to anoxic brain injury. RK died two days later, on September 8, 2012. CP at 61.

C. The Washington State Patrol Investigates

Following RK's death, Crain and four other employees were placed on alternate assignment to allow an investigation of the incident. CP at 63-64, 73. The Washington State Patrol conducted the investigation on behalf of DSHS and interviewed Crain, among many others. CP at 63, 80, 103.

Crain acknowledged that he only made visual observations of RK during the event. Crain explained that because he had observed RK breathing and not in apparent distress he did not want to disturb RK. CP at 59-60. Crain stated, "unless I have a question for [a patient], I don't bother them...that's something you learn from experience...we're there to comfort them... so I would not disturb him." CP at 60.

Based upon the Washington State Patrol investigation and surveillance video footage, DSHS concluded that Crain failed to assess RK's wellbeing and that this failure violated a series of hospital policies. CP at 94. DSHS specifically criticized Crain for failing to touch RK or ask him if he was alright as he lay on the floor. CP at 94.[2] Crain was found to have violated three Western State Hospital policies. First, he violated Policy 3.4.4, which provides that "[a]ll Patients have the right to treatment in an environment free of neglect, abuse, and of abusive procedures." The policy further states that "all employees are expected to diligently avoid both the substance and appearance of Patient abuse while maintaining firm adherence to those principles of respect for the dignity of Patients and their families...." Second, he violated Policy 4.1.1, which declares that "[a]ll patients have the legal right to (1) adequate care and individualized treatment." And finally, he violated the Code of Ethical Conduct, which articulates a focus on patient care and safety, and serves to supplement DSHS Administrative Policy 18.64 "Standards of Ethical Conduct for Employees." CP at 97-98.

[2] During the DSHS investigation and again in his deposition, Crain identifies the fact that RK died at the hospital rather than on the floor of the ward as significant. CP at 38-39, 62-63. RK's death is a tragic conclusion to the failure of those on the ward, but as the termination letter explicitly states, the failure to assess—not the death—drove DSHS' decision. CP at 94.

D. Five Employees Are Separated from Employment as a Result of the Failure to Assess

Based upon the findings of the investigation, DSHS formally terminated Crain, Parsons, and Psychiatric Security Attendant James Smith. CP at 42; CP at 94, 112. The Registered Nurse 3 Victoria David was forced to resign.[3] CP at 42-43. And Margaret Karimi, a nonpermanent Psychiatric Security Attendant, was separated at the conclusion of her term of employment. CP at 74.

E. The Union Elects Not to Pursue Crain's Grievance

Crain, Parsons, and Smith filed grievances against their termination through a process established by a Collective Bargaining Agreement between DSHS and their Union. Parsons and Smith were restored to employment through a negotiated settlement between DSHS and the Union. CP at 40.

Crain's grievance was not pursued as far as those of Parsons and Smith. CP at 40. Crain stated that his grievance process did not go as far as Smith's "(b)ecause the union decided they would not support me." CP at 40. Crain's Union was not a party to his underlying lawsuit.

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[3] Ms. David's racial identity is inconsistently reflected throughout the record. Crain, when asked about Ms. David's race, replied "She's not Caucasian. She's not African American, and I know that she has some different nationalities in her. Don't quote me because I don't know." CP at 156-57. DSHS concedes Ms. David is of mixed race.

F. The Ramifications of Crain's Prior Employee Misconduct

Crain recognized the Union did not pursue his grievance in the same way as Smith and Parsons' grievances because this was not Crain's first misconduct. Crain intentionally misrepresented and concealed information from the Department of Labor and Industries regarding his ability to work in 2010 and 2011. CP at 64-66; 127. Crain received workers' compensation funds on two separate occasions, after he claimed that a workplace shoulder injury prevented him from doing his job at Western State Hospital. CP at 64-65. In reality, Crain was working two separate jobs throughout both of these periods of feigned disability. CP at 65. Through this deception, Crain unlawfully took over $11,000 in workers' compensation. CP at 66.

After Crain's dishonesty was discovered, a pre-disciplinary meeting was held on July 24, 2012, in which Crain's Union representative negotiated the opportunity to have a Last Chance Agreement in lieu of dismissal. CP at 66-68, 123. As the name suggests, a Last Chance Agreement provides an employee who acknowledges misconduct a "last chance" to avoid further misconduct over a specified period of time. If the employee is unable to avoid misconduct, then the contract requires the employee to resign or be terminated. As Crain recalls, it was made clear to him that "if I did anything else wrong, I could be terminated." CP at 68.

The agreement also stated that it would remain in effect until Crain repaid the benefits he dishonestly obtained. CP at 68-69; 123. When Crain was dismissed following RK's death, the Last Chance Agreement was still in effect as Crain did not repay the balance owed until after he was terminated. CP 72.

In sharp contrast to Crain, neither Parsons nor Smith was working under the cloud of a Last Chance Agreement. Following their terminations, the Union pursued settlements for Parsons and Smith. The Union determined it would not further pursue Crain's grievance.

IV. ARGUMENT

In reviewing the trial court's decision, the Court of Appeals engages in a de novo review. *Elcon Const., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). The trial court properly granted DSHS' motion for summary judgment on Crain's claims of disparate treatment and wrongful termination. With respect to the claim for disparate treatment, summary judgment was proper because there are no proper comparators to establish a prima facie case of disparate treatment; DSHS articulated legitimate, non-discriminatory reasons for the employment action; and Crain has neither shown those reasons to be pretextual nor presented evidence that race was a substantial factor motivating DSHS. Summary judgment on the wrongful termination claim was appropriate

because the record is completely devoid of any evidence supporting the claim. CR 56(c).

A. DSHS Was Entitled to Summary Judgment Because a Prima Facie Case of Disparate Treatment Cannot Be Shown

In bringing a claim of race-based, disparate treatment, Crain failed to meet his burden of proof. Crain contended that DSHS violated Washington's Law Against Discrimination, which prohibits employers from terminating employment because of an individual's race or gender. RCW 49.60.180. In bringing this claim, Crain bore the burden of setting forth a prima facie case of discrimination. *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973)). Because Crain was incapable of establishing a prima facie case, DSHS was entitled to judgment as a matter of law. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, at 181-82, 23 P.3d 440 (2001).

Disparate treatment occurs when "'[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.'" or other prohibited characteristic. *Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985) (quoting *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). To establish a prima facie case,

Crain was required to show: (1) that he is a member of a protected class, (2) that he was treated less favorably in the terms and conditions of employment, (3) than a similarly situated non-protected employee, and (4) the non-protected comparator was doing substantially the same work. *Washington v. Boeing Co.,* 105 Wn. App. 1, 16, 19 P.3d 1041 (2000). There is no dispute that Crain is a member of a protected class, thereby satisfying the first prong. Crain's claim fails because he cannot point to a valid comparator and therefore cannot establish the remaining prongs.

1. Race was not a factor

In a race-based disparate treatment claim, the plaintiff must show that his or her race was a substantial factor in the claimed adverse action. *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995). "Substantial factor" means a significant motivating factor in bringing about the employer's decision. *Id.* Crain does not dispute these standards. The RK incident, and the investigation that ensued, resulted in varying degrees of employment actions including non-renewal of a temporary contract, forced resignation, and, for some, termination.

A prima facie case of disparate treatment depends on a proper comparator. A comparator must do "substantially the same work" and is "nearly identical to the plaintiff." *Washington*, 105 Wn. App. at 16; *Wilson v. B/E Aerospace, Inc.,* 376 F.3d 1079, 1091 (11th Cir. 2004). The

comparator must be similar in all "relevant aspects" to the circumstances of the plaintiff. *Patches v. City of Phoenix*, 68 Fed. Appx. 772 (9th Cir. 2003) (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998)). Summary judgment is appropriate where the plaintiff fails to identify a proper comparator. *Haubry v. Snow*, 106 Wn. App. 666, 677, 31 P.3d 1186 (2001).

In Crain's case, the adverse action was termination of his employment. He was not alone. Parsons and Smith were terminated for their involvement in the same incident. Parsons is Caucasian. Smith is African-American. The termination of Parsons, a similarly situated non-protected employee engaged in substantially the same work, is troubling for Crain's claim. The lack of non-protected comparator who was treated *more favorably* is fatal. *Washington,* 105 Wn. App. at 14.

Crain's claim of race-based treatment is further undermined by his statement that "[b]oth [Psychiatric Security Attendant] Katherine Paulino (of Pacific Islander descent) and [Psychiatric Security Attendant] Roberta Lopez (of Latin American descent), were back to work following the investigation after a mere three months of reassignment, and there is no known evidence of any internal letter of admonishment or reprimand or intent to discipline ever issued to either of them in their respective personnel files...". Appellant's Brief at 18. Assuming this statement was

supported by the record, it only serves to further DSHS' position that Crain lacks a valid comparator in that both of the Psychiatric Security Attendants referenced enjoy protected status.

The record is devoid of evidence that would suggest Crain's race was a factor at all, much less a substantial factor, in the employment action here. Crain was not singled out in the investigation and termination phase of his employment and, in fact, was joined by another employee who is of non-protected status. Furthermore, Crain points to employees who occupied the same position and enjoyed similar protected status, who were treated more favorably. Once again, he is entirely incapable of demonstrating a prima facie case that he was treated less favorably than a non-protected employee during the investigation or in his termination.

2. The Last Chance Agreement leaves no valid comparator for the employment action

Contrary to Crain's argument, neither Smith nor Parsons are comparable employees. Only Crain was subject to a Last Chance Agreement when he was terminated. If the Last Chance Agreement were not in effect, Crain would have been in a similar position to Smith – both of them had worked on the ward for a significant time as Psychiatric Security Attendants; both were African-American; both were involved in

the RK incident; and both were terminated. But only Crain was subject to termination under the contractual terms of the Last Chance Agreement.

The Last Chance Agreement renders Smith and Parsons improper comparators for disparate treatment. Crain's Last Chance Agreement is a unique and specific circumstance of his employment that is indivisible from his claim. It is a legitimate, non-discriminatory rationale for Crain's termination and the decision not to rehire him. Because Crain was uniquely situated as the lone employee operating under the cloud of a Last Chance Agreement, he lacks a valid comparator. Crain's disparate treatment claim, whether analyzed at the point of termination or rehire, fails as a result.

B. Even if a Prima Facie Case Had Been Presented, Summary Judgment Would Have Been Appropriate

If it had been possible for Crain to establish a prima facie case, the burden of production would have shifted to DSHS. *Scrivener*, 181 Wn.2d at 446; *citing Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988). DSHS would have met this burden by showing that it had a legitimate, nondiscriminatory reason for terminating Crain. *Id.* In violation of his job duties and hospital rules, Crain ignored a patient in need. Crain would have had to overcome the showing of a nondiscriminatory reason for termination by producing sufficient evidence

that DSHS' legitimate, non-discriminatory reasons for terminating him were pretextual, or that discrimination was a substantial factor motivating the employer. *Scrivener*, 181 Wn.2d at 446-47. Crain could not begin to meet this burden.

1. DSHS had a legitimate, nondiscriminatory reason for terminating Crain

Crain's primary responsibility was helping hospital patients such as RK "achieve safe, self-sufficient, healthy and secure lives." CP at 78. Crain's individual Performance and Development Plan, which he signed in the year leading up to the RK incident, lists the most important objectives, outcomes, and/or special assignments he must accomplish to ensure success. CP at 78. Chief among Crain's listed objectives was client safety. He was specifically required to "minimize safety problems and increase patient's health success" by "being observant of patient behavior". CP at 78. Crain was also expected to "[r]eport to nursing and medical staff and document any observable changes in resident's behavioral, physiological, and mental and psychological state." CP at 79. The same document also refers to the "most important skills and abilities" and lists "Judgment and Problem Solving" as paramount expectations. CP at 79. Crain was expected to "[b]e able to detect early signs of problems, behavioral and physiological so that he can intervene...." CP at 79.

The fact that RK suffered an untimely death due to a choking incident on September 6, 2012 is undisputed. Crain was responsible for recognizing that RK was in distress and timely intervening—whether that meant personally assisting RK or notifying medical staff. He did neither. Based on review of surveillance video and the Washington State Patrol's investigation, DSHS determined that Crain walked past RK at least four times as he lay on the ground in distress. CP at 95. Furthermore, two patients informed Crain that something was wrong with RK. CP at 95. By Crain's own admission, he was not prompted to act. CP at 92, 95. RK remained on the ground for approximately seven minutes without being assessed. CP at 95. Crain not only neglected the paramount function of his job, but also was found to have violated hospital policies and procedures pertaining to "Patient Abuse" and "Patient Rights," as well as the "Code of Ethical Conduct." CP at 97-98.

Crain's failure to adhere to hospital policy triggered a violation of the Last Chance Agreement he had entered into with DSHS and his Union. The Last Chance Agreement contained a specific provision that stated in relevant part "[y]ou will strictly comply with DSHS policies, to include DSHS Administrative Policy 18.64 *Standards of Ethical Conduct for Employees...*". CP at 124. Crain seemed to acknowledge his understanding of that provision during his deposition, stating "I'm clear that if I did

anything else wrong, that this (the Last Chance Agreement) would be applied to me." CP at 71.

Crain's Last Chance Agreement contained a mandate that he voluntarily resign if he failed to abide by the terms and conditions of the agreement. CP at 125. As a result of his role in the RK incident, Crain was asked to resign. CP at 101. Crain's failure to comply with the request for resignation triggered a clause in the Last Chance Agreement that calls for termination of his employment. CP at 102. The Notice of Dismissal summarizes the events leading to the Last Chance Agreement, the incident involving RK, and the specific policy violations—it concludes with the pronouncement that "[t]his type of behavior amongst a vulnerable population is inexcusable and cannot be tolerated." CP at 95-102.

When the employer meets its burden of producing a legitimate, nondiscriminatory reason for their employment decision, the employee must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual, or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer. *Scrivener*, 181 Wn.2d at 446-47.

2. Crain did not and cannot show pretext or produce evidence of a discriminatory motivation

Assuming that Crain could establish a prima facie case for discrimination—a feat rendered impossible due to the lack of valid comparators—he is still unable to survive summary judgment under *Scrivener* based upon his inability to produce sufficient evidence that DSHS' legitimate, non-discriminatory reasons for terminating him were pretextual, or that discrimination was a substantial motivating factor. *Scrivener*, 181 Wn.2d at 446-47.

This shifting of the burden is satisfied by demonstrating one of five factors: (1) the articulated reasons have no basis in fact, (2) the articulated reasons were not really motivating factors for the decision, (3) the reasons were not temporally connected to the adverse employment action, (4) the factors were not motivating factors in similar employment decisions, or (5) discrimination was a substantial factor in the employment decision. *Scrivener,* 181 Wn.2d at 447-48.

For example, in *Scrivener*, the plaintiff was able to create a question of fact by presenting circumstantial evidence that age played a role in the employer's decision not to hire the plaintiff. *Scrivener,* 181 Wn.2d at 449-50. Specifically, the plaintiff presented evidence that the decision maker had made a number of statements endorsing the desire to

hire individuals outside of a protected class (people under 40). *Id.* The Supreme Court held this was sufficient evidence to create a question of fact regarding the decision maker's hiring of two individuals under the age of forty. *Id.*

Crain has failed to present *any evidence* to suggest the stated reasons for his termination—that he was found to have violated hospital policies while he was subject to a Last Chance Agreement—were pretextual. Furthermore, Crain has not shown that discrimination was a substantial factor motivating DSHS. Instead, Crain asserts various conclusory statements alleging discrimination but utterly lacking in support, with no citation to the record or direction to any other evidence that would bolster his claims. Such statements alone are insufficient to establish pretext or create a question of fact surrounding the presence of discriminatory motivation. To hold otherwise would eviscerate all paths to summary judgment in employment matters.

Crain also claims that he has been "exonerated of wrongdoing" by the Department of Health and the Pierce County Prosecutor and he uses this bare assertion to stand for the proposition that there are material facts at issue regarding discrimination. Appellant's Brief at 35. Again, Crain fails to tie this conclusory statement to anything resembling a nexus between the specific policy violations, the decision to terminate his

employment, the advocacy choices of his Union, or his Last Chance Agreement. Inquiries regarding licensure by the Department of Health or criminal charging decisions by the Pierce County Prosecutor are separate and distinct from an investigation conducted by the Washington State Patrol at the request of DSHS.

Crain put forth no evidence that would suggest termination was improper when a patient, whose safety he was tasked with ensuring, died as a result of his neglect. Furthermore, the undisputed fact is that Crain had entered into a Last Chance Agreement that called for his termination in the event of a finding that he had violated hospital policy. Crain cannot impeach or discredit these two facts. There is no evidence by way of statements, testimony, or records that creates a competing inference that race was a substantial factor in Crain's termination. As a result, even if Crain had been able to establish a prima facie case—and he did not—summary judgment for DSHS would be appropriate.

C. Crain Cannot Contest the Quality of the Union's Advocacy by Suing DSHS

Crain contends that the Union failed to advocate his case to the same extent that it advocated for Smith and Parsons. CP at 40-41. Crain's position is corroborated by a letter from the Union's Statewide Grievance Committee Chair informing Crain that "after reviewing and deliberating

the merits of your grievance, the Committee ... voted to not pursue further processing of the grievance." CP at 573. The letter goes on to state that "[i]n this instance, the Committee found that based on the evidence presented, the employer met its burden of just cause under Article 27 to impose the discipline." CP at 573. DSHS is not a proper defendant to Crain's claim that the Union should not have stopped arguing on his behalf, while continuing to advocate for Smith and Parsons.

D. Crain Has No Viable Claim for Wrongful Discharge

The Supreme Court first recognized a common law cause of action for wrongful discharge in violation of a clear mandate of public policy in the landmark case of *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). In cases following *Thompson*, it acknowledged that public policy tort claims generally arise in four areas: "(1) where the discharge was a result of refusing to commit an illegal act, (2) where the discharge resulted due to the employee performing a public duty or obligation, (3) where the [discharge] resulted because the employee exercised a legal right or privilege, and (4) where the discharge was premised on employee 'whistleblowing' activity.'" *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989) (citations omitted). In Crain's case, there is absolutely no evidence to support such a claim.

To establish a wrongful discharge claim, a plaintiff must show: (1) the existence of a clear public policy in Washington; (2) that discouraging the conduct plaintiff engaged in would jeopardize the public policy; and (3) that the public-policy related conduct caused the discharge. Even if these elements are met, the employer must still prevail if it can offer an overriding justification for the dismissal. *Piel v. City of Federal Way,* 177 Wn.2d 604, 609-610, 306 P.3d 879 (2013), *Briggs v. Nova Services,* 166 Wn.2d 794, 801, 213 P.3d 910, 914 (2009); *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Crain does not even attempt to point to any specific public policy related to his claim, or demonstrate that discouraging his conduct would somehow jeopardize such a public policy. He has made no showing that public policy related conduct caused his discharge. It would appear that Crain has abandoned this cause of action altogether on appeal. To the extent that wrongful discharge is still a viable claim, it is without merit as the record lacks any evidence to support it.

V. CONCLUSION

Based on the foregoing, Respondent respectfully requests that the trial court's order dismissing this case on summary judgment be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of January, 2017.

ROBERT W. FERGUSON
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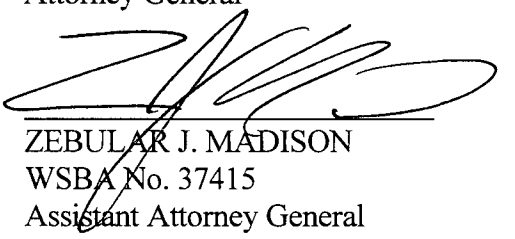

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PROOF OF SERVICE

I certify that I served a copy of the *Brief of Respondent* on Appellant's counsel of record on the date below via e-mail and personal service by Camille Berta on this 23rd day of January, 2017, as follows:

Thaddeus P. Martin
7121 27th Street West
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of January, 2017, at Tacoma, WA.

SHARON JARAMILLO, Legal Assistant